

SUPREME COURT OF QUEENSLAND

File No S 8361 of 1999

BETWEEN:

TCP QUEENSLAND (PROJECTS) PTY LTD

Applicant

AND:

BARCO SYSTEMS PTY LTD

Respondent

MOYNIHAN J – REASONS FOR JUDGMENT

DELIVERED ON: 27 April 2000

HEARING DATE/S: 28 September 1999

ORDER: Vary the statutory demand of 23 August 1999 to \$99,680.52 from that date.

CATCHWORDS: CORPORATIONS – WINDING UP – application to set aside a creditors statutory demand for payment of debt – application of s.459H of the *Corporations Law*.

COUNSEL: W Cochrane for the applicant.
D Andrews for the respondent

SOLICITORS: Bells Solicitors for the applicant.
Gadens Lawyers for the respondent.

- [1] TCP Queensland (Projects) Pty Ltd (herein referred to as “TCP”) seeks to set aside “in accordance with s.459H of the *Corporations Law*” Barco Systems Pty Ltd’s (herein referred to as “Barco”) statutory demand of 23 August 1999. Section 459H applies where there is a genuine dispute about the existence or amount of the debt to which Barco’s demand relates or where TCP has an offsetting claim. In those circumstances the court is to calculate the balance of the debt and set aside the demand or vary the amount depending on the outcome of the calculation.

- [2] Before considering other issues it is convenient to deal with a preliminary matter raised by TCP. It is submitted to the effect that Barco's affidavit material filed in response to the application does not comply with s.459E(3), Rules 52 and 53 of the *Corporations (Queensland) Rules* and Form 13 under those Rules. The argument, as I understand it, is one by way of analogy since s.459E(3), Rules 52 and 53 and the Form relate to the verification of a statutory demand.
- [3] No doubt the respondent's affidavit material must comply with the general provisions of the rules as to affidavits and properly raise issues calling for a consideration of the issues raised by s.459H. Absent specific provisions, I am not prepared to conclude that the requirements applying to an affidavit supporting a statutory notice apply in an application such as this. The point about a statutory notice is that failure to comply with it may found a presumption of insolvency with consequences for parties beyond the immediate parties. While Barco's material is hardly a model for applications such as this, the following emerges from the evidence as a whole.
- [4] TCP contracted with Perpetual Trustees (Qld) Limited and the Townsville and Thuringowa City Councils as joint venturers under the *Townsville Breakwater Entertainment Centre Act 1991* to supply and install audio visual services at the Townsville Breakwater Entertainment Centre. It is clear that the contract was a troublesome one.
- [5] On 23 December 1997, TCP placed a purchase order with Barco to "supply and deliver" to specified addresses particular items to be used in the projection system. In respect of some items, delivery "by 7 Feb 1998" was specified. Barco delivered the equipment and invoiced TCP, by three invoices dated 6 February, 28 April and

20 May. Barco's statutory demand is founded on TCP's failure to pay in full the sum owing under the invoices which were on 30 day terms.

- [6] On 27 September 1999, TCP sued Perpetual Trustees, the two Councils and Barco claiming damages for breach of contract or of s.52 of the *Trade Practices Act 1974* (Cth). It will be appreciated that any contract between TCP and Barco is different from that with Perpetual Trustees and the Councils and that is reflected in the pleading in the action. TCP alleges against Barco that the equipment supplied by Barco was faulty and that its late performance delayed performance of the company. It seems that TCP is also in dispute with two other equipment suppliers who it has not paid in full.
- [7] Leaving aside TCP's dispute with Perpetual Trustees, the Councils and other suppliers, it seems clear enough that TCP does not dispute that Barco supplied the goods. The amount referred to in Barco's statutory notice, \$237,729.45, remains unpaid for the supply and delivery of the goods. The issue is whether TCP has an offsetting over topping claim.
- [8] The equipment may have been supplied some days late. The order provided for delivery of at least some items by 1 February. In communications after the order TCP sought delivery for installation by 13 February. The equipment was apparently delivered by 6 February. The evidence does not support a conclusion that this delay, if it was in breach of the contract between Barco and TCP or contrary to any representation made, caused TCP any damage. This is particularly so given what appears as to the dispute between TCP, Perpetual Trustees and the Councils. For example, it seems that TCP was as much as six months late in completion of their contract.

- [9] TCP swears to an offsetting claim for \$232,247.93. A TCP internal report of 12 October 1998 refers to the disputed amount with Barco as \$70,247.93 and an “outstanding balance of \$167,481.52”. TCP has sued Barco for \$166,327.90. The difference from \$232,247.93 is explicable by a reduction of \$62,000.00 because of the contract between TCP, Perpetual Trustees and the Councils limiting liquidated damages to \$100,000. A further reduction of \$2,000 seems to come from a claim for \$34,199 for extra parts and equipment being redeemed by that amount. The claim for this item is in any event dubious given the material of the contract between TCP and Barco.
- [10] Barco’s submission that TCP’s claim in respect of a balance of \$163,327 (rather than \$167,481.52) after the two sums just referred to are deducted is “mere bluster or assertion” and lacking genuineness, cf *Re Morris Catering (Aust) Pty Ltd* (1993) 11 ACLC 919, is not without foundation. The evidence supports a conclusion that TCP is anxious not to pay Barco or other suppliers until it has resolved its dispute with Perpetual Trustees and the Councils which are withholding monies from TCP. To take the next step and find TCP’s claim is mere bluster and assertion, however is, in my view, not quite justified on the evidence as it stands. The appropriate course in the circumstances is to vary the statutory demand of 23 August 1999 to \$99,680.52 effective from that date.